

**MARK BRNOVICH
ATTORNEY GENERAL**

(Firm Bar No. 14000)

REBEKAH BROWDER (BAR NO. 24992)

ANGELINA B. NGUYEN (BAR NO. 30728)

ASSISTANT ATTORNEYS GENERAL

2005 N. Central Ave

Phoenix, AZ 85004

(602) 542-7768

Rebekah.Browder@azag.gov

Angelina.Nguyen@azag.gov

Attorneys for State of Arizona

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:

PETITION TO AMEND ER 8.4,
RULE 42, ARIZONA RULES OF
THE SUPREME COURT

R-17-0032

**ATTORNEY GENERAL'S
COMMENT TO PETITION TO
AMEND ER 8.4, RULE 42, ARIZONA
RULES OF THE SUPREME COURT**

The Arizona Attorney General hereby submits this comment regarding the R-17-0032 Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court.

Respectfully submitted this 21st day of May, 2018.

MARK BRNOVICH
ARIZONA ATTORNEY GENERAL

BY: /s/ Angelina B. Nguyen
ANGELINA B. NGUYEN
ASSISTANT ATTORNEY GENERAL

MEMORANDUM OF POINTS AND AUTHORITIES

The Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court, R-17-0032 (the “Petition”), proposes adoption of a new Rule of Professional Conduct governing “harassment [and] discrimination” “related to the practice of law” that departs significantly from the current rule prohibiting Arizona attorneys from engaging in “professional misconduct . . . that is prejudicial to the administration of justice.” Ariz. R. Sup. Ct. R. 42, ER 8.4(d).

There is no place for invidious, status-based, discrimination in the legal profession. The Petition, however, raises significant constitutional concerns, including potential infringement of speech and association rights. Content-based speech regulations require the most exacting level of constitutional scrutiny, *see Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011), and the government must abstain from viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Also implicated is attorneys’ First Amendment right to participate in expressive association. The Supreme Court has recognized that the First Amendment protects the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Freedom of expressive association is “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Id.* And it further

“prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Like freedom of speech, the right of expressive association is not limitless, but any infringement of the right must “serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts* at 623.

The Court should consider these concerns, as well as the opposition from other states, state attorneys general, and state bar associations.¹

Respectfully submitted this 21st day of May, 2018.

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ARIZONA ATTORNEY GENERAL

BY: /s/ Angelina B. Nguyen
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ASSISTANT ATTORNEY GENERAL

¹ In the majority of states where the Petition’s language has been considered, the proposed rule has either been rejected (South Carolina, Tennessee); withdrawn after much opposition (Nevada); or—where it has not yet been decided—opposed by state attorneys general, bar associations or disciplinary boards, and/or the state legislature (Louisiana, Illinois, Pennsylvania, and Montana). The Texas Attorney General issued an opinion opposing the rule, even though it has not yet been formally proposed in Texas. Only one state, Vermont, has adopted the Petition’s language into the state’s ethical rules governing lawyers.